

DECISION



24827
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-209083

DATE: April 13, 1983

MATTER OF: Gentex Corporation

DIGEST:

1. Protest that specifications are not sufficiently rigorous to produce safe and usable product is dismissed since GAO will not question agency determination that a less restrictive description will meet agency needs. GAO generally will not consider allegation that more restrictive specifications should have been employed, since use of unduly restrictive specifications violates statutes and regulations requiring free and open competition in Federal procurement.
2. Responsibility for tests and procedures to determine product acceptability rests with contracting officials and user activities which are in the best position to determine the Government's minimum needs and methods of meeting them.

Gentex Corporation (Gentex) protests the specifications under invitation for bids (IFB) No. DLA100-82-B-1116 for SPH-4 flying helmets (helmet), issued by the Defense Logistics Agency (DLA). Gentex asserts that the technical data package, which includes the specifications for the helmets, is "not only defective, but potentially highly unsafe."

We dismiss the protest.

This IFB was issued on August 13, 1982. As a result of Gentex's protest to GAO, the bid opening was postponed. DLA conducted a review of the specifications to consider the issue raised by Gentex's protest. An amendment was issued on November 1, 1982, which made changes to the IFB. Gentex communicated further objections to the revised specifications on November 12, 1982. Another amendment to the IFB was issued with two further modifications on November 17, 1982. Bids were opened on December 1, 1982, and nine bids,

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including a bid from Gentex, were received. While the protest was pending, award was made to the two lowest bidders.

Essentially, Gentex argues that the specifications continue to be defective because the solicitation does not incorporate certain quality assurance provisions, makes erroneous technical statements, and may have serious physiological and life safety consequences.

Gentex specifically asserts that construction of the helmet shell in accordance with the DLA specifications may improperly eliminate certain specified benchmarks and that dimensional tolerances for the fit of the helmet are improper and will affect adversely the helmet's safety and wear. Gentex argues that the material used to construct the helmet shell, specifically the ear section, and the minimum shell thickness requirement are inadequate and may ultimately result in the helmet cracking after use. Gentex also requests the inclusion of quality assurance provisions beyond the contract inspection clause. Specifically, Gentex asks for tests of the sheer strength and resin content of the helmet shell to identify exterior finish coating defects, especially relating to a danger of improperly secured screws, and to assure proper visor guide adhesion. Gentex further argues that the specifications permit excessive space between the helmet liner and shell which could create an unsafe stress on the liner. Regarding these alleged specification deficiencies, Gentex concludes that:

"* * * the response by the procuring agency to our protest does not address the many major safety hazards which continue to exist in the technical data package as it presently is written. We believe that as a result, the technical data package will not result in the consistent production of useable safe helmets on a mass production basis."

Gentex further asserts it is in the best position to analyze the specifications as issued and to determine whether they would result in the production of defective products. Gentex advises that it was the original designer of the helmet, that the helmet has been covered by licensing agreements between Gentex and the Department of Defense, and that the helmet has never been successfully procured on a

mass production basis from any company other than Gentex. Gentex also alleges that Gentex may be subject to potential product liability civil actions because it is the original designer of the helmet. Thus, Gentex apparently contends that because of its history as allegedly the only successful manufacturer of this helmet and the potential for product liability claims, the specifications have been relaxed improperly and should be more restrictively drawn.

DLA reports that it has reviewed Gentex's concerns, has revised the specifications where it found Gentex's contention had merit, and now thinks its specifications result in a helmet which will meet its minimum needs.

We will not consider Gentex's protest. Although our Office reviews allegations that prospective contractors are prevented from competing by unduly restrictive specifications, we do so because the use of such specifications violates the statutes and regulations requiring free and open competition in Federal procurement. Miltope Corporation--Reconsideration, B-188342, June 9, 1977, 77-1, CPD 417, aff'd on reconsideration (second), July 1, 1977, 77-2 CPD 3.

Quite a different situation is presented when, as here, a protester argues that the Government's interest as user is not adequately protected. Presumably, Gentex would benefit if it were able to convince DLA of its position, because it could then be considered as a potential sole-source supplier. This apparent interest is not a protectable one under our bid protest function, the purpose of which is to insure that free and open competition is attained. Miltope Corporation--Reconsideration, supra. In other words, Gentex's allegations are not a matter of legal concern because the effect of including other firms in the procurement is consistent with the statutory requirements to broaden competition. Joseph Pollak Corporation, B-209899, December 23, 1982, 82-2 CPD 573; Worthington Group, McGraw-Edison Company, B-207348, et al., June 4, 1982, 82-1 CPD 534.

Further, contracting officials and user activities are responsible for insuring that sufficiently rigorous specifications are employed, since they must suffer any difficulties due to inadequate equipment. For these reasons, absent evidence of fraud or willful misconduct on the part of such officials, we consistently have refused to review allegations that more restrictive specifications should have been used. Grove Manufacturing Company, B-202531, August 17, 1981, 81-2 CPD 147; Constantine N. Polites & Co., B-198089,

June 23, 1981, 81-1 CPD 518; Ring Power Corporation,
B-201683, March 9, 1981, 81-1 183; Miltape Corporation--
Reconsideration, supra.

The same general rule applies to the tests and procedures to determine product acceptability: responsibility rests with contracting officials and user activities. In either case, these individuals are most familiar with the conditions under which the supplies or services being procured will be used and are, therefore, in the best position to determine the Government's minimum needs and methods of meeting them. Our Office will not question the technical judgments on which those determinations are based unless they are clearly shown to be unreasonable. Joseph Pollak Corporation, supra.

We note that in Grove Manufacturing Company, supra, because of the serious allegations raised concerning potentially dangerous safety problems with the equipment being procured, we recommended that the agency give further consideration to Grove's allegation regarding safety features. However, here, the record shows that DLA has considered Gentex's comments and that first article testing will be performed on these helmets before their widespread use; therefore, we find it unnecessary to recommend that any further action be taken in these circumstances.

We dismiss the protest.

Harry R. Van Cleve
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Acting General Counsel